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No. 707

UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

JOHN W. GAINES, Guardian of the Estate of Claude B. Gaines,
PETITIONER (APPELLEE BELOW)

v.

SUN LIFE ASSURANCE COMPANY OF CANADA
RESPONDENT (APPELLANT BELOW)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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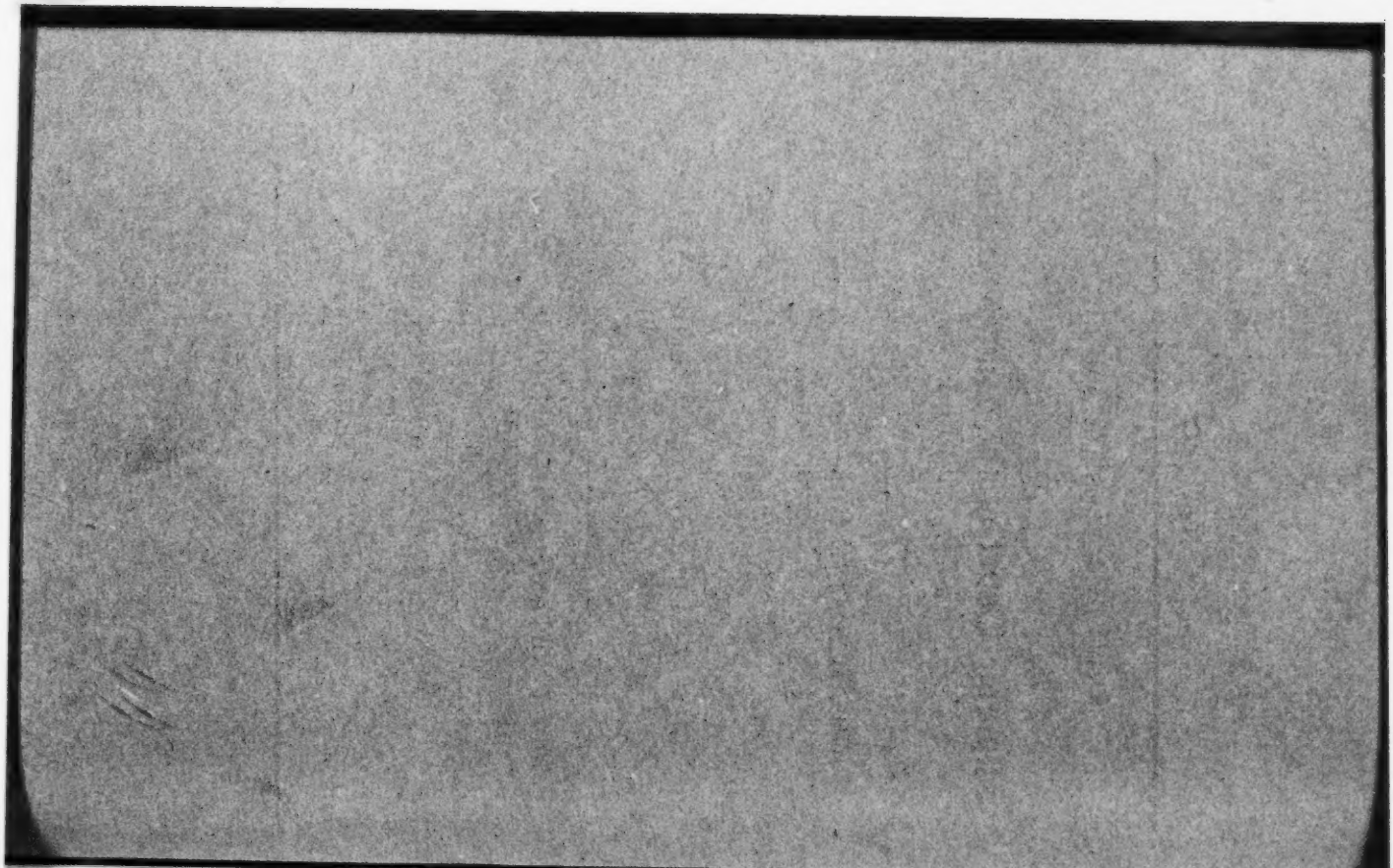

SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

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SHORT AND SUMMARY COUNTER-STATEMENT OF THE CASE

The petitioner's ward, Claude B. Gaines, held two of respondent's life insurance policies of the aggregate face amount of $25,000.00. They included identical disability clauses providing benefits at the rate of $250.00 per month, if the assured furnished due proof, before default in the payment of any premium, that "he has become totally and permanently disabled by bodily injury or disease," as defined in said policies (R. 13, 14; for text of disability clause: R. 461, et seq.; received in evidence R. 169).

The policies called for the payment of annual premiums on February 7 and March 3, respectively, of each year. The premiums due on those dates in 1935 were not paid (R. 24).

The disability clauses, according to their terms, and with proper allowance for the grace period, expired on March 9, 1935, and April 2, 1935 (R. 461-63, 496).

On September 18, 1940, this suit was instituted upon the disability clauses, and the petitioner's declaration averred that the assured had been totally and permanently disabled since November 1, 1934, "as a result of a disease or diseases commonly known as chronic alcoholism, drug addiction and other impairments of the mind, the exact name being unknown to the plaintiff", and that the assured was not competent or able to present proof of his disability, but that due proof was furnished by the petitioner (R. 13).

PLAINTIFF'S TESTIMONY IN REGARD TO ALLEGED TOTAL AND PERMANENT DISABILITY, MENTAL INCOMPETENCY AND WAIVER OF PROOFS.

The petitioner's testimony showed that: The assured, a licensed physician specializing in eye, ear, nose and throat diseases, was a heavy drinker of intoxicating beverages, and that both before and after his wife died in July, 1933, he was drinking heavily (R. 68, 47), and that this continued during 1933 and 1934, when he was intoxicated quite frequently (R. 55), and 1935, when in September, he had delirium tremens (R. 273); also that he used some drugs, other than alcohol (R. 147).

The first medical treatment or hospitalization of the assured was on June 4, 1935, a little more than two months after the disability clauses terminated for non-payment of premiums (R. 340); he was in a hospital, on that occasion, for one day, and several times after that for short intervals, because of chronic alcoholism; was in the Ford Hospital from October 18 to November 8, 1935 (R. 140). He was at the Homewood Sanitarium in Canada from the latter part of January, 1936, until April, 1936 (R. 158).

On February 5, 1936, John W. Gaines, the petitioner, and George W. Bailey were appointed his guardians under the Michigan statute (Michigan Compiled Laws, 1929, Sec. 15763, as amended), providing for medical and sanitary treatment of persons addicted to the excessive use of intoxicating liquors or noxious drugs (R. 472, 473). In the petition on which the guardians were appointed, the assured was described as a "spendthrift, incompetent to have the care, custody and management of his estate" (Exhibit 48, R. 473, received in evidence R. 394).

On October 23, 1936, the guardians filed a sworn petition in the Wayne County Probate Court in which they averred that the assured had received treatment and had recovered and was in a proper condition to resume his profession and the responsibility of his affairs * * * (R. 302, 303, received in evidence R. 302).

On October 27, 1936, a formal order was made by the Probate Court, adjudging that the assured was no longer in need of guardians and discharging them (R. 212, received in evidence R. 211).

The assured resumed the practice of medicine in December, 1936 (R. 114, 129), and continued so to practice until 1939 (R. 129).

During this three-year period, the assured continued to practice as an eye, ear, nose and throat specialist (R. 127), treating and operating on eyes, ears, noses and throats of patients (R. 127, 128), though he did, at times, drink to excess.

A physician with whom he was associated testified:

> "He was with me three years and I trusted him the first two (R. 129). I trusted him so much that I sent my own father to him" (R. 128).

Petitioner's principal medical expert testified that the assured's condition in April, 1936, was such after his release from the Homewood Sanitarium that the assured *was competent to practice medicine and competent to manage his own affairs if he did not revert to liquor or drugs* (R. 157, 158). *This was at least a year after the termination of the disability clauses.*

It was not claimed at the trial, nor was any evidence offered that any proof or even notice of the claimed disability was given to the respondent until September, 1935, approximately five months after the disability clauses expired. During that month, petitioner stated he orally made claim for the disability benefits (R. 266), and that liability was denied by respondent on the ground that the disability clauses had lapsed (R. 266).

The assured did, in fact, carry on the practice of his profession and managed his own affairs through the years 1937, 1938 and a part of 1939 (R. 129).

However, he reverted to the drinking of intoxicating liquors to the extent that petitioner, on August 6, 1940, filed a new petition for the appointment of a guardian, on the grounds that the assured was a "spendthrift, mentally incompetent to have the care, custody and management of his estate, and that it was necessary that a guardian be appointed."

The petitioner was again appointed guardian on August 6, 1940, and so continued to the date of the trial, June, 1942 (R. 259).

The foregoing testimony, all introduced by the plaintiff himself, or brought out from his witnesses on cross-examination, fully warrants every statement of fact in the opinion of the Supreme Court of Michigan, and we believe, conclusively refutes petitioner's unfounded charge that the

decision of that court is "so grossly erroneous and so extremely arbitrary as to amount to spoliation" (R. 493-500).

THE GROUND ALLEGED FOR PETITIONER'S CLAIM THAT HE WAS DENIED DUE PROCESS

An examination of the petition for writ of certiorari shows that only one possible ground is set forth therein as a basis for the contention that petitioner was deprived of property without due process of law. That is his claim that the Supreme Court of Michigan decided the cause against him on a proposition of fact which the respondent, defendant below, had, in its pleadings, conceded in his favor; and that he therefore had had no occasion or proper opportunity to introduce his evidence. *Saunders v. Shaw*, 244, U. S. 317. (No other decision cited by the petitioner is even remotely in point, on his claim that he was denied due process.)

This requires an examination of the pleadings to determine, first, whether the defendant did concede the fact alleged, and second, whether, if conceded, it was a controlling fact, having in mind the limited nature of this court's power of review of a state court judgment.

The defenses asserted by the respondent, the defendant below, in its pleadings and at the trial, to petitioner's demand for total and permanent disability benefits, were as follows:

(a) That its liability for benefits, under the policies sued on, was not conditioned upon the existence of total and permanent disability, but rather *upon the receipt* by the company *of proof* of the total and permanent disability, *by bodily injury or disease before a default in the payment of premiums*, and that no proof was made prior to the default. (Defendant's answer, paragraph IV. R. 15, 16, 17,

18.) Cf. *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 498.

(b) That the insured did not become totally and permanently disabled, as defined in the policies, as a result of a disease or diseases known as chronic alcoholism, drug addiction and other impairments of the mind, while the policies were in force. (See Paragraph VI of plaintiff's declaration, R. 13, and Paragraph V of defendant's answer, R. 19, 20, 21, 22.)

It was conceded by petitioner in his reply to the defendant's answer that the insurance premiums due under the policies on the 7th day of February and the 3rd day of March, 1935, were not paid, and that no subsequent premiums were ever paid (R. 24).

At the conclusion of the plaintiff's testimony, the defendant moved for a directed verdict of no cause of action on the ground that the record conclusively showed that the assured was not totally and permanently disabled *as defined in the policies of insurance declared upon* at any time while those policies were in force (R. 366).

This motion was renewed at the conclusion of all the testimony (R. 401).

A written motion for judgment notwithstanding the jury's verdict was filed in which the same ground was asserted, and also the additional ground that on the undisputed testimony no proof that the assured had become totally and permanently disabled as a result of bodily injury or disease as defined in the policies declared upon, had been furnished the defendant before default in the payment of premiums (R. 435, 436).

There is no warrant whatever for the assertion of petitioner, on page 4 of the petition, that the defendant conceded at the trial that the assured was afflicted with a disease as defined in the policies.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

The assertion of petitioner that:

> "It is a violation of due process of law for a state Supreme Court to reverse a case and render judgment absolute against the party who succeeded in the trial court upon a proposition of fact which was immaterial at the trial because conceded by the defendant and concerning which the plaintiff, therefore, had no occasion and no proper opportunity to introduce his evidence,"

may be true as an abstract proposition of law, but to have the advantage of such a rule or to invoke *Saunders v. Shaw*, 244 U. S. 317, petitioner must show *by the record, rather than by his unsupported assertion,* that he is within the rule.

It will be observed that counsel *does not cite the page of the record* upon which he relies to support the claim in the petition for certiorari, that the defendant conceded that the insured was afflicted with a disease.

In his brief, he cites the defendant's answer (R. 19, 21, 22), but an examination of the answer wholly fails to show such a concession.

It would seem that if an admission in a pleading is relied upon, the words in the pleading alleged to constitute the admission *should be set forth with particularity and quoted,* with a citation to the record where the quoted material can be found. This the petitioner has not done.

THE OPINION AND JUDGMENT OF THE SUPREME COURT OF MICHIGAN, 306 MICHIGAN 192

The opinion of the Supreme Court of Michigan which is alleged by petitioner to violate the due process clause of the Constitution, and by which the judgment in favor of the

plaintiff in the trial court was reversed without a new trial (R. 492-500), is based upon the following findings:

(a) That plaintiff had failed, as a matter of law, to sustain his burden of proof by evidence that established total and permanent disability while the disability clauses were in force (R. 495, 496);

(b) That claim for the disability benefits was not made while the disability clauses were in force, as required thereby (R. 497);

(c) That "the incompetency of the assured, occasioned by drunkenness and the use of drugs, did not furnish proper evidence of total and permanent disability occasioned by bodily injury or disease; nor was it any excuse for failure to pay the premiums due in February and March, 1935" (R. 496);

(d) That the assured's mental incompetency due to the use of alcohol and drugs did not excuse failure to file proofs before default in the premium payments (R. 496), and that this, of itself, barred recovery.

THE MICHIGAN JUDGMENT IS FULLY SUPPORTED ON GROUNDS INVOLVING NO FEDERAL QUESTION

The petitioner bases his contention that he was denied due process only upon ground (c) above, in that, he says, he was, by reason of the respondent's alleged concession, prevented from offering evidence that disability due to alcoholism and drug addiction is "disability by disease".

It is clear, however, from the court's opinion and from the record, that grounds (a) and (d) above, were each a sufficient foundation for the court's action in rendering a final judgment against petitioner, and that (c) was unnecessary to the decision.

The rule is well settled that where a state court "rests its judgment upon a non-federal ground adequate to support it, the existence of a federal question is of no significance." *Bilby v. Stewart,* 246 U. S. 255. In such cases the United States Supreme Court has no jurisdiction:

Klinger v. State of Missouri, 13 Wall. 257;

Consolidated Turnpipe Co. vs. Norfolk Railway Co., 228 U. S. 596;

Minneapolis, etc. Railway v. Washburn, 254 U. S. 370;

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157;

United States v. Hastings, 296 U. S. 188;

Fox Film Corp. v. Muller, 296 U. S. 207;

McCoy v. Shaw, 277 U. S. 302.

The question of whether mental incompetency, assuming it to exist, excuses an insured from making proof to the insurer of total and permanent disability is a question of local law on which the decision of the state court is final, and will not be disturbed by the Supreme Court of the United States. *Mutual Life Insurance Co. of New York v. Johnson,* 293 U. S. 335; *Trainor v. Aetna Casualty and Surety Co.,* 290 U. S. 47.

CONCLUSION

It conclusively appears from the pleadings, from the record and from the opinion of the Supreme Court of Michigan that:

1. The petitioner had a full opportunity to present his evidence and to assert and advance all his rights in the state trial court and in the Michigan Supreme Court;

2. The judgment complained of did not in any manner offend Article XIV, Sec. 1 of the Amendments to the Constitution of the United States;

3. The judgment sought to be reviewed is amply supported on grounds which involve no federal question, and therefore, even if a federal question exists, which we deny, the judgment is not subject to review by this court.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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